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CENTRAL CONTROL OF ALL CARRIER RATES A NECESSITY.

We think it derogates in no way from strict states' right doctrine to concede the authority of Congress to control local rates chargeable by common carriers. The interstate commerce clause was intended to confer plenary power, as decision has iterated and reiterated, but the necessity of this spreading over intrastate carriage was not greatly apparent when the Constitution was adopted, nor for decades later on.

The states, therefore, began to exercise control over common carriers just as over others exercising franchises, and rightly, too, so far as the intrinsic rights of these carriers were concerned. If the states were limited in any way as to them it was because of their surrender to Congress, which surrender is operative only to the extent Congress elects it to be. This seems fully shown in the epochal opinion of Mr. Justice Hughes in Simpson v. Shepard, 33 Sup Ct. —

But this surrender involved little, if anything, of state policy regarding its domestic control over health, morals, safety, contractual and family relations or rights and remedies. A citizen in his personal capacity has no right to demand of a common carrier the rendition of any service, but as a member of the public, in consideration of its duty to the public as a whole, he is entitled to make such demand. The state accords and may withdraw. Just as Justice Hughes says congressional power is dormant so far as the state is concerned, so also it may be said state power as to this right in citizens, singly, is dormant.

We see from this that strictly the operation of any public utility is not a business, except permissively, but it is a mere convenience of the public. In treating of a carrier company the learned justice speaks of the property it "employs for the public convenience," and under this view it would seem that confiscation is unconstitutional more upon the idea *ex debito justitiae* than for any other reason—a sort of estoppel against the public to demand bankruptcy of its servitor. It is governmental good faith not to do so.

But this rule applies to the state and the reason therefor may not carry it over to our national control of carriers and this we will consider further along. Here it is sufficient to say that the rule in whatever territory it has force forbids citizens claiming from different companies supplying the same public conveniences, uniform charge for the same services, if all do not derive therefrom the profit they are entitled to earn.

Just as, however, we see that there is this limitation, so also we see more clearly that there is in a public utility a mere convenience belonging to the state and in which no citizen has any but a derivative right. It is an incident to other rights. Resting on acquiescence by the state as *parens patriae* it is nothing to its other economies, if it relinquish this to the general government. It did far more than this, when it vested in the general government the power to declare contracts between individuals void.

But does the confiscation rule as applied to states inhere in the commerce clause? This clause seemingly has no relation to personal rights. It concerns a thing and its agencies or instrumentalities. The power to regulate the latter has, in iteration and reiteration, been declared plenary.

To be plenary in regulation there exists the power to exclude unfit instrumentalities, and, therefore, their entrance into interstate commerce may be conditioned. If they cannot comply they may keep out. With the difficulty or expense of compliance Congress has no concern primarily, though a secondary consideration in its mind might be that it ought to see that compliance is not so burdensome, that instrumentalities may not continue to be employed in such commerce.

Regulation, therefore, out of wise policy providing for attractive compensation, might conceive, that successful regulation was seriously fettered, if uniformity in rates may not be preserved. Conditioned thus, no carrier is asked or expected to engage in interstate commerce if it cannot stand this in the same way as it does any other regulation.

But does this get us over to intrastate carriers whose right is to earn compensatory rates, so far as state control exists? It does, if Congress may for any reason control their operations whenever they interfere with the plenary power vested in Congress.

Remembering again, that to be a common carrier is to exercise a franchise, and conceiving that the states meant that such a franchise was granted as subsidiary to the plenary power previously conferred by Congress, it is not difficult to regard a railroad for interstate business like a navigable stream—one of the highways of the commerce—and fully as subject to congressional control. We think it undoubted that Congress may fix rates for all sorts of transportation on an interstate navigable stream, so as to prevent their interference with proper control, generally, of interstate commerce. That one highway is natural and the other is built up by man is of no concern to the regulating power.

This does not yet get us to a railroad with intrastate location and termini. But the argument comes back to a consideration of plenary control as or not being interfered with by a convenience operated under a franchise. Why does it not take its chances like an interstate road? It has subsidiary rights, just like the other, under its grant from a subsidiary power. As to this plenary control, investors were notified before they invested. We see no difficulty, therefore, about this.

Taking it, therefore, that instrumentalities, and not the cost thereof, are the only thing to be considered by Congress in regulation, every uniformity contributing to the success of regulation is enforcible by Congress. As to states, the chief requisite in regulation is denied by the confiscation rule, and the Interstate Commerce Commission will forever be pouring water through a sieve, if it cannot control intrastate rates.

NOTES OF IMPORTANT DECISIONS

MONOPOLY—USING UNION LABEL AS A MEANS TO SECURE CLOSED SHOPS.—Danbury, Ct. is portrayed in a recent case decided by Connecticut Supreme Court of Errors as a locality where a laborer is "placed in a more disadvantageous position or brought under a greater pressure to surrender his freedom of choice" in not being a union man, than any place of which the court has any knowledge. In other words there is a situation where the efforts of union labor to control the employment of labor have met with their completest success. It is upon the creation of this situation and activity thereunder that the court finds that the officers of a labor union made themselves personally liable for bringing about plaintiff's discharge from employment as a hatter. Connors v. Connolly, 76 Atl. 600.

The reasoning of the court is not altogether clear. For example, it says it declines to go the length of some courts which "appear to give countenance to the broad proposition that every agreement, whatever the conditions, by a labor union with an employer, which provides that the latter shall not employ either at all, or in any department of his work, any other persons than union members is contrary to public policy." But the fact of a monopoly actually eventuating is not at all differentiated in its reasoning. In assertion but not in reasoning, the opinion appears to apply the doctrine of unreasonableness found in the Standard Oil case.

But the defendants argued that the closed shop employers accepted the conditions imposed in consideration of their right to use the union label. The opinion quotes from the defendant's brief: "We believe that the United Hatters of North America, as the owners and

controllers of the union label, could absorb all of the labor market in any community, so that persons who were not members of the organization would be unable to obtain work at hatting in that community, as long as the label stands for what it does in the shape of skilled labor, improved sanitary conditions and long-term contracts. These advantages to society at large would outweigh any disadvantages which might accrue to a few people desiring to obtain work because the rule of law in relation to a closed shop, as enunciated by (some courts) is based upon the theory that the excluded workman is equally as good as the member of the organization and that all have an equal right to employment. But it is respectfully submitted that this rule of the common law is based upon reason and when the reason for the existence of the rule ceases the rule itself ceases."

The court expresses its amazement at such a proposition, but it need not be so greatly amazed in view of so many, many things courts have done under cover of the maxim appealed to. Had they legislated less the reasoning might never have been addressed to a court. There seems here, however, to be announced a fairly good basis for legislation under the police power.

But as to the intrinsic rights between employer and labor unions in respect of the label the court says: "The United Hatters has a property right in its label. It may withhold it from those who do not comply with the conditions it attaches to its use. It may grant its use to those who do so comply. It may employ its advantages in all lawful ways. But it can no more employ it for an unlawful purpose or as an unlawful means, than it or any other person can any other thing it or they own or any other agency at its or their command."

Here the argument becomes quite close. It suggests recent decisions in patent cases, but neither of these sustained the patentee's claim save by grant to one of a sort of monopoly by force of patent law. Furthermore the principle is like dead sea apples to the taste. All the owner of the label has to do is to sit tight and let the employer enforce the agreement upon promise of not having his right to use the union label revoked. What seems to have gotten these defendants into liability was in spurring employers to refuse employment to plaintiff.

RECENT DECISIONS IN THE BRITISH COURTS.

Changing manners and circumstances have resulted in an extended meaning being given to the term "necessaries" in questions concerning the liability of infants. Roberts v. Gray, 1913 I. K. B. 520, further enlarges that liability, for it decides that a contract entered into between an experienced billiard player, the plaintiff, and the defendant, an infant of unusual promise, was a contract for "necessaries," as an important part of it was instruction which the younger player would receive. And as there was nothing burdensome in its terms to prevent its being enforceable against the infant it was binding upon him; and not the less so that part of it was executory owing to his having repudiated the contract after it had been in operation for a certain time, up to which he had had the benefit of instruction.

A husband and wife by their marriage settlement covenanted to settle any after-acquired property accruing during coverture in right of the wife. Some did accrue which was not transferred to the trustees, but held by the husband and invested in certain securities. After the husband died the trustees of the marriage settlement claimed these securities on behalf of the widow and children of the marriage. It was held, Pullan v. Koe, 1913, 1 Ch. 9, that they were entitled to them, as in equity the money became trust money from the moment it accrued, and this was known by the husband.

In Grierson v. the National Provincial Bank of England, Ld., reported Bankers Magazine, Vol. 95, p. 880, the facts were that the plaintiff had taken a legal mortgage over property expressly subject to an equitable charge in favor of Grand and Maddison's Bank, by whom the deeds were held. The mortgagor went to the plaintiff's with a check for £1,150, which he exchanged for their check for £900, leaving £250 in part payment of the legal mortgage. He informed them that he was going to pay the £900 to the bank, but, in the words of the judge, they "did not know exactly how much was due to Grant and Maddison's bank from the mortgagor, or at all events did not know that he was going to uplift title deeds from them." As a fact, he paid off the bank, took away the deeds, and pledged them by way of equitable mortgage with the defendant bank, who were, of course, unaware of the prior legal mortgage and claimed to retain them in respect of their debt. Now the point is, that although, as the judge said, it might be ex-

pedient that a second mortgagee (in this case the legal mortgagees) should give notice to the first mortgagee, he did not in this case do so, not even when informed by the mortgagor that he was about to make a substantial payment to that first mortgagee. It cannot be denied that this omission alone made it possible for the mortgagor to raise money in fraud from the defendants. The judge, however, said that he was unable to understand how it could be made out that this amounted to negligence on the part of the legal mortgagee, in whose favor he gave judgment. He based his decision on the well-settled rule that it is not incumbent upon a second mortgagee to give notice to a prior mortgagee, and that this position in law or equity would not be in any way prejudiced by the omission.

It is no part of the duty of a bank's customer so to conduct his business as to facilitate the banker's business. On this principle the decision in Walker and Stirling v. the Manchester and Liverpool District Bank issued last month is an illustration. The plaintiffs had a clerk who forged three checks on their account for £250, £250 and £100, which were paid by the bank. After the first check was paid the plaintiffs got their pass book, and if they had examined it they would have noticed the forgery, and the subsequent frauds would have been rendered impossible. The plaintiffs, however, contended that it was no duty of theirs to examine the pass book, and the judge, although he said that it was not quite clear that for no purpose could it be said that there was such a duty, held that in the case under notice, this point was not important, because the omission to scrutinize the pass book was not in law the cause of the second and third checks being honored, and he gave judgment for the plaintiffs for £600 and costs.

The recent case of the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, Ltd. v. the King and the Provincial Treasurer of Alberta, is one of great interest. Some $6,000,000 was raised in London to pay for the construction of a Canadian railway, against mortgage bonds. The money was deposited in the Royal Bank of Canada in the name of the provincial treasurer, to be paid to the construction company as the work progressed, but until paid out to be deemed part of the mortgaged premises. There was delay in construction; a change in the government, a law by the new administration ratifying and confirming the guarantee of the bonds by the province, but appropriating the balance of the account. The bank refused to pay the money over to the government who brought an action and were successful, both in the court of first instance and on appeal. The case was again appealed to the judicial committee of the British Privy Council, who allowed the appeal. The committee held that the act in question was invalid. "The special account was opened solely for the purposes of the scheme, and when the action of the government * * * altered its conditions, the lenders * * * were entitled to claim from the bank * * * the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province and the legislature of the province could not legislate validly in derogation of that right."

DONALD MACKAY.

Glasgow, Scotland.

A PLEA FOR THE SCIENTIFIC PREPARATION OF WILLS.

Civilization permits you and me to make a private law for the disposition of our property after death. We call that private law a last will and testament. In that instrument we can legislate for the good or ill of our families and our estates. We may legislate cautiously, prudently and wisely. If we fail to do so, however, we shall not personally suffer, but the suffering caused by us will fall to the lot of those we love.

The present generation is demanding better wills than did its predecessor and the legal profession is responding to that demand. The will of the late J. Pierpont Morgan is a product of that demand. It is a type of the best class. It suggests wise foresight in its plan and a skillful hand in its preparation.

Before proceeding further permit me to remind you of the meaning of two simple words. The word "safe" means free from danger, not dangerous. The word "sound" means without flaw. In applying these words to wills we may consider that a "safe will" is one so written as to insure the fulfilment of the maker's wishes. We may also understand that a "sound will" is one without flaw and one that can be enforced even though it may not insure the result

the maker wishes. In other words a "safe will" insures the fulfillment of the maker's wishes and a "sound will" may or may not insure the fulfilment of the maker's wishes depending upon circumstances. A little later I will give you a concrete example of a sound but unsafe will. Let us now proceed in the light of these definitions.

There are three distinct classes of wills: (1) those that are both safe and sound; (2) those that are sound but not safe, and (3) those that are neither safe nor sound. Mr. Morgan's will is, of course, both safe and sound. The will of the late Edward H. Harriman is clearly sound, but for our purposes, as will appear later, we must class it as unsafe. The will of the late Samuel J. Tilden is, of course, a most conspicuous example of a will that is both unsafe and unsound.

Within each class there are many varieties of wills often tangled one into another, in the most bewildering manner. Wills of the first class usually give little or no trouble after death. Neither do the wills that are clearly and wholly void, for that means no will at all. The difficulty arises with wills that are neither clearly all good or clearly all bad.

If the difficulties presented by a will are discovered during the life of the maker it is a simple matter to take out bad and doubtful clauses and to substitute sound ones. If, however, the maker is dead the doubtful and bad clauses must stand as they are written. If anyone objects he can go to the court. The lawyers will take their portion of the estate and the court will render its decision and hand back what is left to the litigating heirs.

Mr. Harriman's Will.—The Harriman will is also a typical will. At the time of its publication it was hailed by the press throughout this country as a model will and one which testators would do well to imitate. For this reason it becomes a duty to mention this will by name and to use it as a type for our consideration.

For Mr. Harriman's purposes his will is not open to criticism. When, however, it becomes the subject of great praise in the public press as a model for the preparation of other wills I cannot, in justice to the thousands of innocent people all over this country who have copied this will as their own, let this opportunity pass without sounding a note of warning. Do not misunderstand me. Mr. Harriman and his lawyers knew the conditions with which they were dealing. They were preparing Mr. Harriman's will, not a precedent for other wills. It is only when this will is viewed as a precedent, when people copy it, when it is used to fit quite different financial and family circumstances that it presents objectionable features. Indeed, all wills may be said to present objectionable features when used as precedents without competent legal advice.

For an example of a perfectly sound will that is exceedingly unsafe and liable to defeat the wishes of its maker let us refer to the will of the late Albert C. Bostwick, son of Jabez A. Bostwick, of Standard Oil fame. His will was substantially the same as the Harriman will. Like Harriman, Bostwick gave everything to his wife. The important difference in the two cases was created by the family circumstances. Bostwick had four children born to him after he made his will and Harriman none. Mrs. Harriman took all the property given to her by her husband. Mrs. Bostwick did not. The four Bostwick children born after the making of the will took the bulk of the estate as if no will had been made. Mrs. Bostwick took what was left and the child born before the making of the will took nothing.

At least one other point in the Harriman will might well be noted. It will be remembered that this will makes no provision whereby real estate could be sold for the payment of debts. It was not necessary in Mr. Harriman's case because of his wealth. In many cases, however, it is important. If necessary to pay debts, real estate in the hands of a devisee may be reached by creditors. In other words real estate of a deceased person is subject to a

qualified lien for the payment of debts. Therefore, speaking generally, a devisee cannot give a good title free from that lien prior to the running of the statute unless proper provisions are inserted in the will.

Tilden and Other Wills.—The Tilden will is also a typical will, but of another class. Unfortunately it does not stand alone. Let us mention two other recent wills both in my own city. Every city of importance and almost every county has its full quota of this type.

The late J. Jennings McCoomb made millions in his life time from a little patented article used to fasten steel hoops around cotton bales; a little piece of iron known as a cotton tie. At the time of his death he was the owner of the far famed Spanish or Navarro Flats in New York, now called the Central Park Apartments. The litigation concerning his will was long and bitter. It resulted in the destruction of several trusts, including a trust of those eight great apartment buildings. It wiped out the codicil designed to prevent a particular marriage in his family, and in a large measure otherwise defeated his plans. I have no means of estimating the cost of this litigation, with accuracy, but we are told that the executors expended between fifty and seventy-five thousand dollars in making an unsuccessful attempt to sustain the will. Nothing is known of what it cost the heirs.

The late Henry B. Plant, the principal owner of the great Plant System of Railroads in Florida, was also a resident of New York. He took chances with the Rule against Perpetuities, and his huge trust for the benefit of his descendants wholly failed and in effect his will was adjudged void. The cost of the litigation concerning this will is also said to have been enormous, exceeding half a million dollars on both sides.

The sins of unsafe and unsound wills are the typical sins of omission and commission. Nine out of ten defects and ambiguities are discoverable on the face of a will and the tenth is usually found at no great distance. They are in the plan of the will. They are hidden in the words used, misused and not used. They are germs of strife. Their fruit is suffering for mind, body and estate.

Lord St. Leonards, better known as Sir Edward Sugden, states the facts plainly and forcefully. He says: "No hatred is more intense than that which arises in a man's family after his death, where his will is open to dispute. As you love your family pity them, throw not the apple of discord among them."

I might mention the wills of Charles T. Yerkes, Mrs. Eddy, Robert Mather and scores of other recent wills, both in New York and elsewhere that have been wholly or partly wrecked by an "apple of discord," but the illustrations already mentioned are sufficient. Doubtless every one present can add one or more local instances of disaster where families have been disrupted and the estate wasted in litigation concerning wills.

Diagnosis of Disease Among Wills.—Up to this point we have considered, so to speak, the mortality of wills. Let us now turn our attention for a few moments to a diagnosis of the diseases so common among last wills and testaments.

Until a will takes proper form it is simply a mental state. It is a condition of the mind with reference to matter. It is an aspiration, a wish, a hope with reference to family and estate after death.

Every tangible thing created by man is necessarily a blend of mind and matter. The better the blend the better is the thing created. The better the mind is photographed on matter the better will that mind control and direct that matter after death.

This is as true of a last will and testament as it is of the architect's conception of the great Woolworth Building on Broadway, but there are marked differences worthy of note. A magnificent building as soon as it is executed stands forth in all its glory before the world. It may not be perfect, but its flaws are capable of being re-

paired. A will, on the other hand, is hidden away as soon as it is executed. It lies dormant and unknown. It comes forth to be judged of men only on the day its maker has lost his power to dot an "i" or cross a "t." If after his death the searching storm of adverse interest discovers a flaw in the will there is no remedy. The flaw cannot be repaired. The damage is done. The consequences must follow. We can only say: "Too late; it must stand or fall as written.

What does this mean? It means that too little attention is given to the plan and preparation of the will. It means that the average person about to make a will treats it as a matter of minor importance, less indeed than the making of a simple contract. He is in haste. He explains to his lawyer that he wants a short, plain, simple will. He then makes known his wishes. When he has finished with his instructions the chances are more than even that his lawyer finds it difficult, if not impossible, to accomplish all his client wishes.

Then comes the danger. The client intimates to his lawyer that he wishes quick work and minimum fees. He gets what he orders but not what he wishes. He gets something that his lawyer does not wish to give him but it is the best he can do under the limitations imposed. The client has made his lawyer violate a fundamental rule for good work: "Whatever the haste be not in a hurry. The best work can never be done by a perturbed mind."

After the maker of the will is dead each of the heirs employs a lawyer to search for flaws in the will. The probabilities are that something great or small will be discovered. The unfortunate lawyer who drew the will is then in trouble. He is unjustly blamed when the fault lies at his client's door. He is blamed because he omitted something from the will; because he did not omit something from the will; because some part of the will when applied to facts unknown to him has an uncertainty or double meaning. He is blamed because he did not foresee and provide against every possible contingency that might arise in connection with the testator's family and estate before and after death. In short the lawyer is criticised by all if anything goes wrong and by some if everything goes right and in accordance with the wishes of the deceased.

Better Wills in Sight.—Let us not complain. Let us not criticise. Let us construct. As we are getting preventive medicine so let us have preventive law. As a campaign of education is effective against tuberculosis so will it be effective against unsafe wills. It is in the interest of the client. It is in the interest of his lawyer. It is in the interest of the trust company as prospective executor, or possible creditor. And who will say that better wills and less litigation are not in the interest of the heirs?

How shall we get better wills? The answer is simple; make them. Lawyers are able and willing if that service is demanded. Clients are willing when they appreciate the importance of care and skill.

What then is lacking? If the client will not appreciate the importance of having a safe and sound will there is no help for his family or his estate. If he does appreciate its importance then two things are lacking, but both are within his control. He must give his lawyer a fair chance and demand his best service. When his will is complete he must demand that it be tested while he is alive and able to repair any defects or ambiguities that may be discovered.

How shall wills be tested before death? There is only one way. As a will does not take effect until its maker is dead it cannot be tested by a judicial proceeding during his life. The only method, therefore, is that of scientific constructive criticism by one or more fresh and independent minds. The better those minds are equipped and the more independent they are of the mind which gave the instrument form the better can they forestall adverse

criticism after death and the more sure will be the test.

This does not mean that the mind that tests the will should be hostile to the mind that gave the instrument form. On the contrary both minds should be sympathetic, rather than competitive. They should not be self-centered but broad in their horizon, open to conviction and eager for the truth.

I am advocating no new departure. It is the better practice in England. It is the better practice in America. It produced the will of Mr. Morgan. It is producing hundreds of the best and most important wills each year. If properly done it could not produce a Bostwick will, a McComb will, a Plant will or a Tilden will.

What I said at the beginning let me repeat at the end: A will is a private law which civilization permits you and me to make concerning the disposition of our property after death. In that instrument we can legislate for the good or ill of our families and our estates. We may use that legislative power cautiously, prudently and wisely. If we fail to do so, however, we shall not personally suffer but the suffering caused by us will fall to the lot of those we love. DANIEL S. REMSEN.

New York, N. Y.

TROVER—CLAIM OF RIGHT.

STRICKLAND v. MILLER

Court of Appeals of Georgia, May 6, 1913.

Syllabus by the Court.)

78 S. E. 48.

Where crude gum is wrongfully extracted from growing trees and manufactured into spirits of turpentine and resin, the owner may maintain trover for the manufactured products. If the taking was under an honest claim of right, only the value of the crude gum can be recovered; but if the taking was not in good faith the trespasser can not set off the expense of manufacture.

POTTLE, J.: Plaintiff sued Strickland and the Downing Company to recover the value of certain spirits of turpentine and resin. A general demurrer to the petition was overruled, and Strickland excepted. The petition alleged that during the year 1911 the plaintiff was owner and in possession of a certain tract of land in Brooks county; that the defendant Strickland entered upon this land against the will of the plaintiff and over his protest, and wilfully and without any lawful claim whatever extracted from the pine trees growing on the land, crude gum, from which he manufactured spirits of turpentine and resin and sold the manufactured product to the Downing Company. The argument in behalf of the defendant proceeds upon the idea that the property sued for is fructus industriales, and that, since it appears from the petition that the defendant was in possession of the trees and gathered the crude gum therefrom, the plaintiff was not entitled to maintain an action of trover to recover the value of the spirits and resin manufactured from the gum.

Standing timber is a part of the realty, and this includes the constituent parts of the timber, such as the wood, sap, leaves, etc. However, when timber is severed from the soil, it becomes personalty, and trover will lie to recover it from one who has wrongfully converted it to his own use. Thus in Milltown Lumber Co. v. Carter, 5 Ga. App. 63 S. E. 270, it was held that, where timber is severed from the soil by a trespasser and manufactured into lumber, the owner may maintain trover, and in such an action would be entitled to recover the value of the manufactured product without any deduction for the cost of the labor of manufacture, if the trespass was wilful; but if the trespass was innocent or inadvertent and under a bona fide claim of right the defendant would have the right to set off the value of the labor by which the property has been enhanced. There is little or no distinction in principle between that case and one where a person wrongfully takes a part of the timber, such as the sap, rather than the whole of it. Crude turpentine, which has been extracted from the tree, becomes personalty immediately upon its extraction. Melrose Mfg. Co. v. Kennedy, 59 Fla. 312, 51 South. 595. And where such crude gum has been unlawfully converted trover may be maintained for its recovery. Quitman Naval Stores Co. v. Conway, 63 Fla. 253, 58 South. 840; Branch & Thomas v. Morrison, 50 N. C. 16. 69, Am. Dec. 770. In the case last cited counsel sought to draw a distinction between things which are cultivated on the soil and those which are the natural growth of the earth. It was pointed out by the court that the only distinction between the two is in the fact that things which are

fructus industriales are personal property for some purposes before severance; while things which are fructus naturales are always a part of the realty until they are severed from the soil. After severance both are personalty, and the same principle is applicable to each. The rule that after severance the property becomes personalty and may be recovered in trover has been applied to sand, gravel, standing timber, growing crops, fruit, and turpentine. See cases collated in 38 Cyc. 2016.

Reliance is placed by the plaintiff in error upon the decision of the Supreme Court in the case of Dollar v. Roddenbery, 97 Ga. 148, 25, S. E. 410. It was there held that where, after the rendition of a judgment against the owner of land, he rented the land to another, who planted a crop thereon, the latter was entitled to the crop as against the judgment creditor. This decision, however, was distinctly put on the ground, not that trover would not lie for the recovery of a crop which had matured or been severed from the soil, or which after maturity was to be treated as personalty, but upon the ground that the entry of the tenant was rightful, and his title to the crop was superior to that of the execution creditor. This appears clearly from the following excerpt from the opinion in that case: "It is an ancient maxim of the law that he who rightfully sows ought to reap the profits of his labor, and if he rightfully enter in subordination to the title of another, but his tenancy be terminated without fault on his part and in consequence of some uncertain event, he shall be allowed to take away his way-going crops; for emblements, in strict law, are confined to the products of the earth arising from the annual labor of the tenant. The tenant, under the protection of this rule, is invited to agricultural industry without the apprehension of loss by reason of some unforeseen contingency which might arise and terminate his estate." See, also, Blitch v. Lee, 115 Ga. 112, 41 S. E. 275; Garrison v. Parker, 117 Ga. 537, 43 S. E. 849; Raines v. Hindman, 136 Ga. 450, 71 S. E. 738, 38 L. R. A. (N. S.) 863, Ann. Cas. 1912C, 347.

While the petition in the present case alleges that the defendant was in possession of the trees when the gum was extracted, it is distinctly alleged that this possession was tortious, against the will and over the protest of the plaintiff. If the defendant's possession was under an honest claim of right, he would be liable to the plaintiff only for the value of the crude gum extracted from the trees. But if the taking was willful and not in good faith, as the petition alleges, the plaintiff would be entitled to recover the value of the manufactured product. There was no error in overruling the demurrer.

Judgment affirmed.

NOTE.—*Test of Right to Recover Enhanced Value of Converted Property From Wrongdoer or Purchaser From Him.*—It seems to be undoubted that where there is an honest claim of right, unaccompanied by negligence, a trespasser is not liable for the enhanced value his labor or skill puts upon property and so is the rule as to purchaser from him and that a purchaser from a wrongdoer willfully acting is liable for enhanced value seems also true, as some of the following cases show.

In Evans v. Kohn (Minn.), 128 N. W. 1006, the action was by owners of a city lot for excess loads of sand taken by the renter, and damages were claimed both for the value of the sand and for depreciation in land value. It was held that there was no sufficient evidence of depreciation, but recovery was allowed for the enhanced value of the sand, because there was evidence tending to show that the leasing "was merely a subterfuge for obtaining possession of the property for the unlawful purpose of digging and removing the moulding sand, the existence of which the plaintiffs were ignorant, and that this was stealthily carried on by defendant. Under such circumstances, we have no doubt the plaintiffs could recover from defendant the highest value of the sand while in his possession." For this are cited Tiedeman on Real Property (3d Ed.) § 64; 4 Suth. on Dam. (3d Ed.) § 1034; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Isom v. Rex Crude Oil Co., 104 Cal. 678, 74 Pac. 294; Stone v. Knapp, 29 Vt. 501.

This being the rule where there is bad faith in the conversion it is found, that it may be applied even against an innocent purchaser from a fraudulent converter. Thus in Godwin v. Taenzer (Tenn.), 119 S. W. 1133, the timber converted was held to have been stolen, and the value thereof at the point where it was delivered to an innocent purchaser was recoverable from the latter, instead of its value at the place where the trees were felled. This court held, quoting from Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, that: "The subsequent possession of the thief or the trespasser is a continuing trespass and if during its continuance the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by making logs into boards, etc., the manufactured article still belongs to the owner of the original material and he may take it or recover its improved value in an action for damages." The case of Bolles Woodenware Co. v. United States, 106 U. S. 432, 27 L. Ed. 230, was to same effect, as also Holt v. Hayes, 110 Tenn. 42, 73 S. W. 111. There is nothing held in these cases in regard to an innocent purchaser enhancing value, but it does appear that enhancement by labor or skill of the wrongdoer follows the original property into the hands of such purchaser, which ruling seems more technical than just. To allow the owner to recover original value from the innocent purchaser and have a further action against the wrongdoer for the enhancement would seem

more just, because the innocent purchaser scarcely may be said to have prejudiced the owner in any way—indeed, he rather aids him in the tracing and recovery of his property.

That the innocent user or purchaser of timber unlawfully cut by another from whom he acquired it cannot be made to respond for any enhancement he gives to its value seems a fair deduction from Bynum v. Gay (Ala.), 49 So. 757. Thus in this case it was held that trover would not lie as to timber unlawfully cut by another without defendant's knowledge or consent, used in fencing and constructing houses, his innocent user making the same a fixture. If the innocent user could convert this personalty into realty it is less to hold his improving its value would not inure to the benefit of its owner.

The rule of enhanced value at the time of its purchase from the wrongdoer has been applied to such purchaser in Maine. Waig v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Powers v. Tilley, 87 Me. 34, 47 Am. St. Rep. 304.

In Strubbee v. Trustees Conti. Ry., 78 Ky. 481, 39 Am. Rep. 251, there is very elaborate discussion of the measure of damages both as regards the trespasser and the innocent purchaser from him and one of the reasons advanced for making the latter liable for the enhanced value is that "the trespasses are committed ordinarily by irresponsible parties, and when they are well remunerated a second trespass will be committed with a view to similar results." In other words, this extended rule of *caveat emptor* is to make purchasers still more beware out of judicial cognizance of trespassers' general irresponsibility. This case, however, condemns the rule of value as of the original taking when "the trespasser" in good faith believed it was his and has improved its condition so as to double or treble its value. The court says: "If the doctrine contended for by appellee in this case is sanctioned, as said by Justice Cooley in the case of the Royal Mining Company v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, 'what bounds can be prescribed to which the application of this doctrine can be limited.'" Neither the wanton trespasser nor the party who commits an unintentional trespass can divest the owner of title under any such circumstances. It was said, however, that this case was one of willful trespass.

Michigan decision has fluctuated, but finally it has settled down to the proposition that in willful trespass the enhanced value is recoverable and for unintentional trespass he or his innocent vendee is liable for original value, and an innocent purchaser from a willful trespasser is liable for value at the time of his purchase. Anderson v. Besser, 131 Mich. 481, 91 N. W. 737.

In Texas it was held that an instruction, in effect, that, if the parties were guilty of negligence in going upon appellant's land, or if the trespass was intentional, appellant would be entitled to recover the value of the timber in its improved condition was correct. Messer v. Walton, 42 Tex. Civ. App. 488, 92 S. W. 1037. Here it is seen that negligence amounts to intention. In Trustees, etc. v. International Paper Co., 132 Fed. 92, it was said that good faith was the test and not freedom from negligence upon the question whether enhanced value was recoverable.

It looks to us like judge-made law that the innocent purchaser should be held as stringently to the enhancement rule as his seller, especially if the seller was merely negligent and not wanton or willful. It is well said neither an honest mistake nor intentional wrong in trespass takes away the owner's title, and it would seem rather a subject of legislative purview to declare that property in its changed condition stood as to others innocently purchasing just as before it was changed. C.

ITEMS OF PROFESSIONAL INTEREST.

MEETING OF ALABAMA STATE BAR ASSOCIATION.

The Thirty-sixth Annual Meeting of the Alabama State Bar Association will be held in the Convention Room of the Cawthon Hotel in the City of Mobile, on Friday and Saturday, July 11th and 12th, 1913.

The meeting on Friday will be opened at 10 o'clock a. m., by the Address of the President, Hon Frank S. White.

This will be followed by

Report of Central Council, by the Chairman, Henry Upson Sims, Esq.

Report of Treasurer.

Report of Executive Committee, by the Chairman, W. T. Seibels, Esq.

Paper by J. T. Stokely, Esq., on "Compensation for personal injuries to employees."

Report of the Committee on Judicial Administration and Remedial Procedure, by the Chairman, Hon. N. D. Denson.

Paper by J. K. Dixon, Esq., on, "What should be the requirements in this State for a person to be allowed to practice Law."

Report of the Committee on Legal Education and Admission to the Bar, by the Chairman, Isaac R. Hinton, Esq.

Annual Address, by Hon. Edward T. Sanford, of Tennessee.

Report of the Committee on Correspondence, by the Chairman, Julius Sternfeld, Esq.

Report of the Committee on Legislation, by the Chairman, Hon. J. M. Chilton.

Paper by Jno. E. Mitchell, Esq., on, "The Law's Delay v. The Lawyer's Delay."

Report of the Committee on Publication, by the Chairman, L. B. Rainey, Esq.

Report of the Committee on Local Bar Associations, by the Chairman, W. O. Mulkey, Esq.

Report of Special Committee on Violation of

Code of Ethics and Law by Attorneys, by the Chairman, B. P. Crum, Esq.

Election of Officers.

Each Paper and Report read before the Association, will be open for discussion for one hour, speeches discussing it being limited to ten minutes.

By order of the Executive Committee.

ALEX TROY,
Secretary.

CORAM NON JUDICE

THE NEW FEDERAL EQUITY RULES.

By Hon. Charles F. Amidon.

The last revision of the federal equity rules was made seventy years ago, in March, 1842. Measured by the number and fundamental character of the changes that have occurred, that seventy years would be equal to any seven centuries in the history of procedure.

In England scarcely a vestige is left of the "practice in the High Court of Chancery in 1842," to which the profession is referred by rule 90. Beginning with the procedure acts of the early '50s and culminating in the Judicature Act of 1873, Parliament set the courts free from the enchantment of the old system. The main work of creating a new system, however, has been done by the courts themselves. To them English law has wisely intrusted the regulation of most matters of practice by rules and orders.

While we have been standing still for seventy years, the English courts have never allowed ten years to pass without a careful revision of their practice. The Judicature Act makes it the duty of the Lord Chief Justice to convene the judges of the High Courts for the purpose of revising the rules at least once every five years. They have been faithful to the trust, and have been joined by the whole legal profession in the work of bringing their practice to the highest degree of efficiency. The result is a legal administration which for swiftness, certainty and justice has never been equaled.

In America, too, there have been the most fundamental changes in procedure. The Field Code was adopted in New York in 1848, and from that beginning the Code practice has extended into nearly every state in the Union. Where formal codes have not been adopted, statutes have been passed doing away with all the distinctive features of the old practice.

One need only try to find out what the practice in the High Court of Chancery in England was in 1842 to become impressed with the complete change which has taken place. I was a young lawyer when North Dakota was admitted as a state and the federal courts established here, and undertook to familiarize myself with equity practice. My attention was first directed to the classical note of Mr. Justice Bradley in 114 U. S., at page 112, where he tells us that the proper practice can only be found in the first edition of Daniell, published in 1837, and the second edition of Smith, published the same year. It required nearly two years searching in this country and England to find a copy of these rare books. I doubt if there are three hundred copies extant. So the counsel of the learned Justice was indeed a counsel of perfection.

When I opened the precious volumes to search out the practice in the High Court of Chancery in 1842, I discovered two things:

First. The books were written for the legal profession of the day in which they were published. They assume familiarity with a thousand things that have passed as completely out of human thought as the buried cities of Egypt. What was written could not be understood without familiarity with the daily life of the bar and courts in that remote time.

Second. The High Court of Chancery in England administered equity jurisprudence for the whole nation. To this one court in London all suits were brought from every quarter of England and Wales. It administered not only the ordinary jurisprudence, but also had charge of the estates of minors, lunatics and deceased persons. To meet the needs of this great volume of litigation, a vast and complicated machinery had been organized, the like of which had never been seen in an American court. The very names of the officers of the court were inscrutable. The Six Clerks, the commissioners, the masters ordinary and the master extraordinary, the registrars, the sworn clerks, these were agencies constantly referred to and wholly unknown to the American lawyer.

The "practice" in the High Court of Chancery consisted in a large measure in pointing out the particular parts to be performed by the different members of th's complex agency in carrying a lawsuit through chancery. My own conclusion was that no person, by reading these antiquated authors, could make the practice in the High Court of Chancery of 1842 come alive again, so that he could use it in the trial of a suit in an American court.

So far as I am aware, there have been only two judges in recent times who were masters of that ancient learning. These were Mr. Justice Bradley, whose erudition was equal to his other great abilities, and the late Judge Hammond, of the Western District of Tennessee. Both of these judges had the advantage of having their early training in states where equity and law had been kept distinct, and where learned scholarship had been the pride of the profession.

Judge Hammond, in a judicial opinion, refers to the difficulty of recovering the old practice, and calls attention to the fact that for at least two generations lawyers and federal judges had grown up under the Code system, and as a result that practice had really been more potent in the federal courts than the old English practice. Lawyers and judges had used the analogies of the system with which they were familiar, rather than attempt to seek out with much erudition the old rules of the High Court of Chancery.

I should mention, therefore, as the first blessing conferred by the present revision, that it sets us free from the High Court of Chancery in England in 1842. Hereafter, if questions

arise that are not covered by the rules or by federal precedent, we shall not have to excavate analogies from a long-buried past, but may look for guidance to living systems of procedure.

What impresses one on looking at the new rules as a whole is a general speeding up all along the line. In every case the time limit is shortened and made specific, instead of depending upon such a shifting event as the rule day. The answer must be filed within twenty days after the service of subpoena. The reply, when required, must be served in ten days. The time for motions is usually five days, and in one instance as short as two days.

To those who are inclined to complain of the law's delay, there is some comfort in noting a gradual improvement in the federal chancery practice. By the first set of rules, promulgated in 1822, the defendant always had three months within which to answer, and in some cases a much longer time. By the rules of 1842, the time varies from forty to eighty days; whereas by the new rules, as above stated, the time is reduced to twenty days.

One is next impressed by the pruning away of those matters which obstruct a direct, speedy, and practical administration of justice. Technical forms of pleading are abolished. Amendments are liberal. Errors and defects are to be disregarded "which do not affect the substantial rights of the parties." Exceptions for scandal and impertinence in pleadings are forbidden. The same is true as to exceptions to answers for insufficiency. All such matters must now be dealt with by motion.

The complaint must contain a "short and simple statement of the ultimate facts." The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence, and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies." Replies are abolished, unless the answer sets up affirmative matter.

Demurrers and pleas are also done away with. Such objections must now be taken by motion, if the defect appears on the face of the pleading. Pleas in bar or abatement must be made in the answer and may be disposed of before the principal issues in the case.

At first one might say that there was no advantage in abolishing demurrers and pleas, but a more careful consideration of the subject will justify the rule. They, like exceptions to pleadings, are enmeshed in a general system of dilatory practice. Doing away with the things themselves will tend to do away with the dilatory practices with which they are identified. Compelling a prompt issue will tend to speed the cause.

The rules also provide that these motions and preliminary issues may be set down by either party on five days' notice, and if overruled, and further pleading is necessary, the time for that is restricted to five days. Otherwise a decree pro confesso is to be entered. The whole scheme of pleading here laid down embodies in improved form the best feature of the Code practice.

To bring witnesses face to face with litigants and the court, and there subject them to oral examination and cross-examination, has been the greatest single contribution of the common law to the cause of justice. Its advantages are so manifest that they would long ago have been adopted by chancery, had it not been for the historic contest between the courts exercising common-law and equity jurisdiction. As Lord Justice Bowen once said: Chancery was forever swamped in paper and pleadings; discovery "strained through the legal cullender of counsel," and by him shaped and shaded to meet the necessities of the case, and depositions given in secret upon written interrogatories; in other words, the whole machinery of chancery for producing proof constituted a shield for that fraud which chancery was supposed to circumvent.

Even since the rule disqualifying parties and persons in interest from testifying has been abolished, and counsel have been permitted to be present and examine and cross-examine witnesses, chancery has still clung with foolish idolatry to its "depositions," thus depriving the court of all opportunity to see witnesses face to face, and participate in their examination when necessary.

The new rules at last strike down this hoary evil. "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules." This language embodies the most important change that will be wrought by the present revision. Fidelity to its provisions will add to the labors of district judges, but the advantages will more than outweigh the extra labor.

It is sometimes tedious to preside over the examination of witnesses. This is especially true, if counsel are prolix and belligerent. In the federal courts, however, the presiding judge has authority to hold the trial to a direct and practical inquiry, and the new rules encourage a vigorous exercise of that authority.

The reform just described makes rule 58 inexplicable. This prescribes the old practice of written interrogatories for the examination of parties and the discovery of documents in advance of the trial. Here, if ever, the right of oral examination should be secured. The loss of that right in actions at common law is one of the least creditable chapters in federal practice.

On the equity side the court had a free hand. "The Supreme Court shall have power to prescribe the modes of taking and obtaining evidence, and generally to regulate the whole practice to be used in suits in equity." This is the comprehensive language of the Act of 1842, and is unqualified by any other statute. It is ample authority for a rule securing the right to an inspection of documents and the oral examination of parties before the final hearing.

This right has long existed in England and in most of the states. Its exercise results often in the settlements of suits, and always defines and narrows the scope of the controversy. Rule 58 is a leaf out of the old practice, and is likely to result in the refinements and evasions which made that practice hateful.

The fees of clerks and printers for the record on appeal have been a heavy burden to litigants on the equity side of the court. The new rules

deal heroically with tnat subject. Padding, by the repetition of the title of the cause and the copying of purely formal parts of documents, is forbidden. The setting out of evidence by question and answer will not be tolerated. Finally, counsel are permitted to include in the record only that which is relevant to the review desired, and for a violation of the rule costs may be taxed against the offending solicitor, instead of his unfortunate client.

Appellate courts are partly responsible for the long records. They frequently affirm cases upon the ground that the record does not contain all that was before the trial judge. So long as that doctrine prevails, counsel cannot be blamed for reproducing the entire cause. It ought to be assumed that counsel and the trial judge have included everything necessary to the review sought. Until that is done, we shall have prolix records.

The new rules, as a whole, constitute a splendid piece of constructive work. They will be a vital force in the courts whose practice they define. After they take effect on the 1st of February, counsel cannot safely take a single step in an equity cause without consulting their provisions.

It would be a serious mistake, however, to treat these rules as final, or make of them an excuse for another seventy years of repose. A scientific practice cannot be attained at a single stroke, but is a matter of growth, to be achieved by repeated revisions. When the next revision is made, Congress might well provide a commission, to be appointed by the court, to aid in a work of such far-reaching importance.—The Docket.

BOOKS RECEIVED.

The Lawyer in Literature, by John Marshall Gest, Judge of the Orphans' Court, Philadelphia, Pa. Price, $2.50. Boston, Mass. Boston Book Company. Review will follow.

The Law of Accident and Employers' Liability Insurance, by Hubert Bruce Fuller, A. M. LL. M., of the Cleveland, Ohio, Bar. Price, $5.00. Kansas City, Mo. Vernon Law Book Co. Review will follow.

Volume III of Public Service Commission Reports, First District of the State of New York. From January 1st, 1912, to January 1st, 1913. (Including the Memorandum of Cases Decided Without the Writing of Opinions, from July 1st, 1907, to January 1st, 1913). Published by the Commission, New York. Review will follow.

A Treatise on the law of National and State Banks including the clearing house and trust companies, with appendix containing the National Bank Act as amended, and instructions to the organization of national banks. Second Edition. Price, $7.50. By H. W. Magee, Albany, N. Y. Matthew Bender & Co. Review will follow.

BOOK REVIEWS.

THE LAW ON COMMERCIAL EXCHANGES.

Mr. Chester Arthur Legg, A. B. L. B., of the Chicago Bar, has produced a very timely volume, neatly bound in limp leather, and of excellent make-up in 8vo. size, on the above subject. Notwithstanding the part commercial exchanges play in so many cities the subject has not heretofore received purely independent treatment. This is a surprise, and another is that the volume is not of more ambitious proportions than it is. But this is accounted for by the fact that the author has avoided anything like padding of a law book and has followed rather the rule of condensation, desiring to make his work both a law book and to omit extended discussions in technical matters that would have and thus impair its acceptability to the great body of laymen who compose the membership of Exchanges. There is quite an abundance of authority cited and the questions considered are well treated. The book should find popularity both because it is the only one exclusively referring to a very important subject and for its concise treatment thereof.

The volume comes from the publishing house of Baker, Vorhies & Co., New York, 1913.

HUMOR OF THE LAW.

"What have you to charge against the defendant?" asked a lawyer of an ebony-headed witness.

"Why, de nigger am bigoted," was the reply.

"He's what?"

"Bigoted, bigoted—doesn't yo know what dat am?"

"Why, no," replied the lawyer, who was much of a wag. "Will you define the term, Job?"

"Sartainly, sartainly, I does. To be bigoted, a cullud pusson must know too much for one nigger, and not enough for two niggers."

He was a hardened looking ruffian and in the opinion of the spectators in the law courts, he didn't stand much of a chance.

His counsel, his voice husky with emotion, was addressing the jury.

"Gentlemen," said he, "my client is a very poor man. He was driven by hunger and want to take the small sum of money. All that he wanted was sufficient money to buy food for his little ones. Evidence of this lies in the fact that he did not take a pocketbook containing $250 in notes that was lying about the room."

The counsel paused for a moment to make his appeal more dramatic, but the silence that ensued was interrupted by the sobs of the prisoner.

"Why do you weep?" asked the judge.

"Because I didn't see the pocketbook there," replied the prisoner in heart-broken accents.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attorney and Client**—Agency.—An attorney who directed an official reported to prepare a bill of exceptions and who made no claim that he had authority to bind his client to pay therefor, was liable for the value of the reporter's services.—Bloomfield v. Nevitt, Colo., 131 Pac. 801.

2.——Negligence.—An attorney can not recover from his client a sum paid gy the attorney as costs imposed as a condition to amend the complaint so negligently drawn by the attorney that it did not state the cause of action.—Senftner v. Kleinhaus, 141 N. Y. Supp. 533.

3. **Bankruptcy**—Conditional Sale.—A conditional sale contract, reserving title to the goods in the seller not a transfer by the bankrupt to the seller, nor a preference, within the Bankruptcy Act.—In re Anson Mercantile Co., U. S. D. C., 203 Fed. 871.

4.——Insolvency Proceeding.—An action to cancel certain deeds and subject the land to liens, when converted by amendment into a proceeding to subject the debtor's equity in the land to the liens, not being a general insolvency proceeding, was unaffected by the debtor's subsequent adjudication as a bankrupt more than four months after the liens were obtained.—Virginia-Carolina Chemical Co. v. Rylee, Ga., 78 S. E. 27.

5.——Parties.—The word "parties in interest," who are authorized to object to the allowance of claims in bankruptcy, mean parties who have an interest in the res to be administered, and hence include the stockholders of the bankrupt, who were the only persons who would be injuriously affected by the allowance of a claim objected to.—Rosenbaum v. Dutton, C. C. A., 203 Fed. 838.

6.——Practice.—Where a bankrupt, after filing his chedules and before discharge ascertains the transfer of a debt, he is required by amendment to include the transferee as a creditor in his schedules and give notice to him, unless the creditor is shown to have notice of the bankruptcy proceedings, and otherwise the debt will not be barred by the discharge.—Helu v. Liberman, 141 N. Y. Supp. 314.

7.——Practice.—An order in bankruptcy proceedings, determining the right to participate in the proceeds of admittedly valid securities, is a "proceeding in bankruptcy," reviewable by petition to superintend and revise, and is not a "controversy arising in bankruptcy proceedings," reviewable by appeal.—Snow v. Dalton, C. C. A., 203 Fed. 843.

8.——Presumption.—A court must assume that everything necessary to make a sale in bankruptcy regular was done by the bankruptcy court and that the trustee in making a sale, proceeded with due regularity.—Shinn v. Kemp v. Hebert, Wash., 131 Pac. 822.

9.——Provable Claim.—A claim for breach of contract may be proved in bankruptcy, though the time for performance had not arrived when the petition in kankruptcy was filed.—Wood v. Fisk, 141 N. Y. Supp. 342.

10. **Bastards**—Illegitimacy—The child of a man and woman united in marriage by religious ceremony in a country where at that time only civil marriages were valid was illegitimate.—In re Grande's Estate, 141 N. Y. Supp. 535.

11. **Bills and Notes**—Indorsement.—Where a note is indorsed by two in the alternative, an indorsement by either is sufficient to transfer title.—Page v Ford, Ore., 131 Pac. 1013.

12.——Joint and Several.—The makers of a note providing that "for value received, I promise to pay," were jointly and severally liable to the payee.—Noble v. Beeman-Spaulding-Woodward Co., Ore., 131 Pac. 1006.

13.——Notice to Indorser.—The bankruptcy of the maker of a promissory note does not dispense with the necessity of notice to the indorser.—In re Mandelbaum, 141 N. Y. Supp. 319.

14. **Brokers**—Estoppel.—Where brokers carrying a speculative account for plaintiff during her absence after certain transfers promised to carry the balance until her return, they were not entitled to repudiate such arrangement without reasonable notice of their intention to do so.—Small v. Housman, N, Y., 101 N. E. 700.

15. **Carriers of Goods**—Burden of Proof.—Where, in a shipper's action for injury to a shipment of stock, the carrier pleads and proves a special contract limiting its liability to losses occurring through its negligence, the burden is upon it, and not upon the shipper, to prove that the loss was not caused by its negligence.—McGrath v. Northern Pac. Ry. Co., Minn., 141 N. W. 164.

16.——Carmack Amendment.—Under the Carmack amendment, a carrier is not excused from liability for destruction of goods by flood, un-

less he shows some activity in protecting them as necessity arises.—National Rice Milling Co. v. New Orleans & N. E. R. Co., La., 61 So. 708.

17.——Draft With Bill of Lading.—Where automobiles were shipped under bill of lading, with a draft on the purchaser attached, and the draft was discounted by intervener bank for the benefit of the shipper, intervener became a purchaser of the draft for value and the owner of the machines, so that neither they nor the proceeds of the draft were subject to attachment as the property of the shipper.—The American Thresherman v. De Tamble Motors Co., Wis., 141 N. W. 210.

18.——Waiver.—Whether a written waiver of liability for injuries to a caretaker from ordinary negligence of the carrier is valid depends upon the laws of the state where the accident happened, and not where the contract was delivered.—Fish v. Delaware, L. & W. R. Co., 141 N. Y. Supp. 245.

19. **Champerty and Maintenance**—Public Policy.—A contract between attorney and client by which, in addition to half of a recovery, he was to receive the interest on the judgment and statutory damages on his agreement to pay all costs of an appeal in case the judgment was reversed, held not contrary to public policy.—Grave v. Floyd, Miss., 61. So. 694.

20. **Chattel Mortgages**—Fraudulent.—A chattel mortgage upon a stock of goods, which permitted the mortgagor to sell and replace the goods sold, is invalid and fraudulent.—Newman v. Peyser, 141 N. Y. Supp. 422.

21. **Confusion of Goods**—Mistake.—Where iron of plaintiff was by mistake delivered to defendant, who by mistake mingled it with his own iron and then refused to deliver it to plaintiff, defendant was guilty of converting the iron.—Samuel v. Holbrook, Cabot & Rollins Corporation, 141 N. Y. Supp. 275.

22. **Constitutional Law**—Equal Protection.—A statute that would allow one to sue a publishing corporation for libel in any county he chose, where publications were circulated, would be unconstitutional as depriving citizens of the equal protection of the law.—Houston v. Pulitzer Pub. Co., Mo., 155 S. W. 1063.

23. **Contracts**—Breach.—Where a party to an executory contract puts it out of his power to perform, there is an anticipatory breach which gives the other party an immediate right of action for the damages sustained.—Wood v. Fisk, 141 N. Y. Supp. 342.

24.——Forum.—While the state will not enforce a contract made in another state, which is in conflict with its public policy, it will enforce a contract, otherwise valid, which is not in conflict with its public policy, even though invalid in the state where made, because against the public policy of that state.—Fish v. Delaware, L. & W. R. Co., 141 N. Y. Supp. 245.

25.——Recoupment.—Where defendant's claim of recoupment in an action on a contract for driving logs is based on plaintiff's failure of strict performance, necessitating the services of a third person, he should prove the value of such services.—Blakely v. J. Neils Lbr. Co., Minn., 141 N. W. 179.

26.——Restraint of Trade.—Combinations and contracts of corporations and of individuals, having for their object the restraint of trade, the destruction of competition, and the creation of a monopoly, are unlawful, even though they violate no statute.—Union Trust & Savings Bank of East St. Louis v. Kinloch Long-Distance Telephone Co. of Missouri, Ill., 101 N. E. 535.

27. **Courts**—Jurisdiction.—A federal court of equity has no jurisdiction of an original stockholder's suit against a foreign corporation for the appointment of a receiver to wind up its affairs and distribute its assets, even though its assets may be within its jurisdiction.—Maguire v. Mortgage Co. of America, C. C. A., 203 Fed. 858.

28 **Covenants**—Damages.—Where the title to a six-foot strip of land off the side of a lot in controversy failed, the measure of damages for breach of warranty was the difference between the value of the lot with and without the strip, disregarding any increased valuation because of improvements erected on the lot.—Withers v. Crenshaw, Tex., 155 S. W. 1189.

29. **Corporations**—Capital.—The word "capital" does not mean the corpus of the property or the stock, but with reference to new stock, issued as stock dividend, is property or corpus; the property of the corporation being its real capital.—Bryan v. Aiken, Del., 86 Atl. 674.

30.——Stockholder Liability.—Liability of stockholder for withdrawn capital necessary to pay corporate debts is several, and enforceable in a suit to which other stockholders are not parties.—Kimbrough v. Davies, Miss., 61 So. 697.

31. **Criminal Law**—Expert Testimony. — A test made by physicians by placing a revolver in decedent's hand before rigor mortis and bending her arm to determine whether she could have shot herself was not a matter of skill or science, so as to be a proper subject for expert testimony or demonstration.—People v. Curtright, Ill., 101 N. E. 551.

32.——Overt Act.—An indictment for conspiracy to embezzle and misapply the funds of a national bank, made more than three years before indictment, but involving an overt act committed within the three-year period, was not barred by limitations.—Breeze v. United States, C. C. A., 203 Fed. 824.

33.——Impeaching Verdict.—An affidavit by a juror that, though he appreciated the effect of his verdict, he did not believe it was right when he rendered it, can not be used as a basis for setting aside the verdict and granting accused a new trial.—Imperio v. State, Wis., 141 N. W. 241.

34. **Damages**—Interests.—In actions ex delicto the jury may allow interest as part of the damages, but interest allowed should be included in an aggregate sum with the damages.—City of Milledgeville v. Stembridge, Ga., 78 S. E. 35.

35.——Punitive Damages.—In an action for assault and battery, evidence of the financial condition of the defendant is admissible on the issue of punitive damages.—Schafer v. Ostman, Mo., 155 S. W. 1102.

36. Unlawful Device.—Damages are not recoverable for injuries to a slot machine valuable only when used as a gambling device,

contrary to statute and having no value whatever for any lawful purpose, as the courts can not regard such use as a measure of damages. —Miller v. Chicago & N. W. Ry. Co., Wis., 141 N. W. 263.

37. **Deeds**—Delivery.—The delivery of a deed essential to conveyance of title need not be an actual manual delivery; the intent of the parties, as gathered from their conduct, being the controlling consideration.—Prince v. Prince, Ill., 101 N. E. 608.

38. **Divorce**—Contempt.—A brother of a husband against whom an interlocutory decree of divorce, fixing permanent alimony, had been rendered, held not guilty of contempt for advising the husband to sell his undivided interest in real estate to his co-tenants, brothers and sisters, in the absence of any showing that he advised the husband to leave the state and refuse to pay alimony.—Sidway v. Sidway, 141 N. Y. Supp. 391.

39. **Easements**—Acquirement.—An easement may be acquired by adverse possession.—Goodwin v. Bragaw, Conn., 86 Atl. 668.

40.——Servient Estate.—Where an actual exercise of an easement for a right of way shows that the servient estate suffers unnecessarily great or irreparable injury, equity may in a proper proceeding make such changes in the manner of the exercise of the easement as will conserve his estate, and protect the owner of the easement.—Brown v. Ratliff, Cal., 131 Pac. 769.

41. **Eminent Domain**—Damages.—Danger resulting from the tendency to propagate gophers or squirrels along the right of way if imminent may be considered in determining the damage to land not taken for a railroad right of way in so far as the market value is thereby depreciated.—Idaho & W. Ry. Co. v. Coey, Wash., 131 Pac. 810.

42. **Estoppel**—Silence.—A party will be estopped from asserting as a defense to a claim against him a counterclaim which otherwise would be available, where he has kept silence when good faith made it his duty to speak.—Jacobs v. Bernstein, 141 N. Y. Supp. 287.

43. **Evidence**—Judicial Notice.—The Supreme Court will take judicial notice that there are many miles of small streams that flow in ditches or flumes in the state which may be more or less attractive to children.—Charvoz v. Salt Lake City, Utah, 131 Pac. 901.

44.——Putative Child.—In a civil action for assault and rape, defendant denying all intercourse, it was error to permit plaintiff to exhibit her child, of which she claimed defendant was the father, to the jury, as bearing on the issue of its paternity.—Bilkovie v. Loeb, 141 N. Y. Supp. 279.

45. **Executors and Administrators**—Personal Liability.—An administrator, who continues his intestate's retail mercantile business, may not bind the estate by purchasing and agreeing to pay for merchandise for resale in the business. —Silsby v. Wickersham, Mo., 155 S. W. 1094.

46.——Waiver.—Executors can not waive notice of protest upon a note made by their testatrix, nor by any act create a liability against the estate which does not already exist.—In re Mandelbaum, 141 N. Y. Supp. 319.

47. **Exemptions**—Evasion.—A resident debtor may recover damages against a person who has brought suit in a foreign jurisdiction to evade the exemption laws of the state, and in violation of such laws has collected from the debtor a judgment obtained in such jurisdiction. —Anderson v. Canaday, Okla., 131 Pac. 697.

48. **Fraudulent Conveyances**—Estoppel.—Where a wife conveyed to her husband, without consideration, land which he retained for five years and contracted debts on the credit thereof, and he reconveyed the land to her without consideration after insolvency, she could not assert title to it as against his creditors.—South Side Trust Co. v. Fitzharris, Pa., 86 Atl., 694.

49.——Exchange.—Where the buyer of an insolvent debtor's stock of goods, chargeable with bad faith in the purchase thereof, exchanged it for land, the land was but a substitute for the stock of goods, standing in its place and liable in the same manner to complaining creditors.—Less v. Grice, Ark., 155 S. W. 1169.

50.——Gifts—The rules of law applicable to gifts or conveyances to defraud creditors are applicable to gifts to hinder, delay, or defraud suitors out of their lawful rights in an action. —Gross v. Arians, Wis., 141 N. W. 224.

51. **Frauds, Statute of**—Printed Signature.—A printed signature is sufficient, within the statute of frauds; and where a trader, who is in the habit of delivering printed bills to parcels to which his name is prefixed, delivers one containing the necessary particulars of a contract of sale, it is sufficient.—Goldowitz v. Henry Kupfer & Co., 141 N. Y. Supp. 531.

52.——Verbal Promise.—A verbal promise to sell realty, as well as a verbal sale of same, is good against the vendor or vendee who confesses it when interrogated under oath.—Larido v. Perkins, La., 61 So. 728.

53. **Garnishment**—Jurisdiction.—A garnishee confers jurisdiction over his person by coming into court and filing an answer to the interrogatories of plaintiff.—Western Stoneware Co. v. Pike County Mineral Springs Co., Mo., 155 S. W. 1083.

54. **Gifts**—Delivery.—Where decedent executed deeds to his realty and assigned notes, stock certificates, etc., held by him and placed them in separate envelopes, addressed to his several children, and delivered the envelopes to another, to be delivered to his children after his death, the children took the notes by gift inter vivos.—Snyder v. Frank, Ind., 101 N. E. 684.

55. **Homicide** — Concert.— Where defendants acted together in attempting to escape from a sheriff's custody, and one defendant knew the other's purpose to escape by killing the sheriff, if necessary, they were equally guilty of homicide, irrespective of who shot the sheriff.—Imperio v. State, Wis., 141 N. W. 241.

56. **Infants**—Disaffirmance.—The right of an infant to avoid his deed, in a reasonable time after coming of age, is not affected by the grantee having conveyed to a third person without notice.—Jackson v. Beard, N. C., 78 S. E. 6.

57. **Injunction**—Combination. — The maxim that what a man may do many may do in

combination is not universally true; and it is only those acts which work no invasion of rights when done in combination that may be so done.—Vallejo Ferry Co. v. Solano Aquatic Club, Cal., 131 Pac. 864.

58.——Successive Trespasses.—Where a plaintiff has cause to apprehend successive acts of trespass, a trepasser may be enjoined, regardless of his solvency or insolvency.—Hounshell v. Miller, Ky., 155 S. W. 1148.

59.——Trade Secrets.—An employe will be enjoined from disclosing or using trade secrets communicated to him in the course of a confidential employment, regardless of the character of such secrets.—Macbeth-Evans Glass Co. v. Schnelbach, Pa., 86 Atl. 688.

60. **Innkeepers**—Lien on Baggage.—At common law innkeepers had a lien upon baggage brought upon the premises by guests, whether it belonged to the guests or to third persons; but such lien did not exist in favor of boarding house keepers.—Nance v. O. K. Houck Piano Co., 155 S. W. 1172.

61. **Insurance**—Inurement.—A bond executed by defendant to indemnify a surety on the bond of a foreign insurance company to enable it to obtain a license to do business in Texas held to inure to the benefit of policy holders of the insurance company.—Southwestern Surety Ins. Co. v. Anderson, Tex., 155 S. W. 1176.

62.——Insurable Interest.—A carrier may insure the goods left in his charge, not only for his own benefit, but for the benefit of the owners thereof.—Symmers v. Carroll, N. Y., 101 N. E. 698.

63.——Release.—An insurance company was without power to release a subscriber to a guaranty contract created for the payment of fire losses, where there was a large amount of outstanding insurance written upon the faith of such guaranty.—McConaughy v. Juvenal, Wash, 131 Pac. 851.

64.——Waiver.—A soliciting agent of an industrial insurance company, who has charge of a "debit," solicits new insurance, delivers policies, collects for insurance theretofore written, and deals with the plain people, may waive a provision in a policy that the policy shall be void if assigned.—Jones v. Prudential Ins. Co. of America, Mo., 155 S. W. 1106.

65. **Joint Tenancy**—Survivorship. — Survivorship is not an incident to joint tenancies in this state, and if the right can exist at all it must be created by the will or other conveyance creating the tenancy.—Houghton v. Brantingham, Conn., 86 Atl. 664.

66. **Larceny**—Possession.—Clams planted in a bed under public waters are not the subject of larceny, unless the plot is marked out by stakes, so as to show that the clams are in the possession of a private owner.—Francisco v. Schmeelk, 141 N. Y. Supp. 402.

67. **Life Estates**—Waste.—The life tenant's daughter, to whom the will bequeathed a half interest in the proceeds of the sale of the land after the life tenant's death, held not chargeable for damages caused by cutting the hedges during the life and possession of the life tenant. —Knaup v. Mack, Neb., 141 N. W. 199.

68. **Limitation of Actions**—Mortgage.—A mortgage to secure a mere account for borrowed money is a mere incident to the demand, and is ordinarily barred after five years from its date.—Russell v. Centers, Ky., 155 S. W. 1149.

69.——Pleading.—Where fraudulent concealment will prevent the running of limitations, it must consist of affirmative acts of misrepresentation, mere silence being insufficient, so that a mere general allegation of concealment is bad, and the specific acts relied on must be pleaded.—Glover v. National Bank of Commerce of New York, 141 N. Y. Supp. 409.

70.——Tolling Statute.—Payments by a receiver of a debtor are not effective to toll the statute of limitations.—Shelby Nat. Bank v. Hamrick, N. C., 78 S. E. 12.

71. **Marriage**—Common Repute.—Proof of marriage may be made by evidence of common repute and public recognition by the parties thereto, including their declarations.—Jordan v. Johnson, Tex., 155 S. W. 1194.

72.——Incompetency.—If one of the parties to a marriage ceremony is mentally incompetent, the status of each is unchanged.—Hagenson v. Hagenson, Ill., 101 N. E. 606.

73.——Nullity.—Where one is forced into a marriage contract under penalty of death if he refuses, the marriage will be decreed null.—Simons v. Stevens, La., 61 So. 734.

74. **Master and Servant**—Contractor.—An agreement binding one to furnish at a mine specified timbers for specified prices during a specified period does not make him an independent contractor.—Simila v. Northwestern Improvement Co., Wash., 131 Pac. 831.

75.——Contributory Negligence.—It is not contributory negligence per se for an employe to board a moving train; that depending on the particular circumstances.—Blount v. Charleston & W. C. Ry. Co., S. C. 78 S. E. 24.

76.——Imputable Negligence.—The negligence of a chauffeur furnished with a hired automobile was the negligence of his master, and for injuries resulting therefrom the latter was responsible.—Wallace v. Keystone Automobile Co., Pa., 86 Atl. 699.

77——Regulations.—Where a plan or method of operation deliberately adopted by a master is unnecessarily dangerous, its adoption is actionable negligence.—Williams v. City of Spokane, Wash., 131 Pac. 833.

78.——Regulations.—A master engaged in a hazardous business must promulgate such regulations as will afford reasonable protection to his employes, and for negligence in not doing so he is liable.—Lucey v. Stack-Gibbs Lumber Co., Idaho, 131 Pac. 897.

79.——Regulations.—Where a rule regulating employes had been habitually violated by them with the knowledge of officers of the employer and by the officers themselves, a violation of the rule by an employe did not defeat a recovery for injuries sustained by him.—Memphis Mining Co. v. Shacklett, Ky., 155 S. W. 1154.

80. **Mechanics Lien**—Contractor's Bond.—The clause of a bond given trustees of a state hospital by one contracting to build for them, conditioned to pay subcontractors, laborers, and materialmen, inures to all such persons.—National Surety Co. v. Hall-Miller Decorating Co., Miss., 61 So. 700.

81. **Mortgages**—After Acquired Property.—Where a mortgage deed specifically described

certain real estate and concludes with the words, "and all other real estate which we may own in C. County, New Mexico, or have an interest in," nothing passes under such concluding clause, except such property as is then vested in grantors by legal title.—Ames v. Roberts, N. M., 131 Pac. 994.

82.——Assumption of Debt.—The fact that a mortgagor, after conveying the land, took an assignment of the mortgage in the name of the attorney employed by the mortgagee to foreclose, was not fraudulent on the part of the mortgagor as to his grantee who had assumed payment.—Beach v. Waite, Cal., 131 Pac. 880.

83.——Foreclosure.—Payment of the purchase money by one purchasing at a foreclosure sale, which the judgment of confirmation required to be paid in cash, may be enforced by the court by summary proceedings.—Hoefflin v. Kentucky Title Savings Bank & Trust Co., Ky., 155 S. W. 1159.

84. **Negligence**—Attractive Nuisance.—To bring a case within the doctrine of the turntable cases, the attractiveness of the alleged nuisance must have been the proximate cause of the injury.—Charvoz v. Salt Lake City, Utah, 131 Pac. 901.

85.——Imputable.—Negligence of the driver of a wagon in which plaintiff was riding as a guest, at the time of a collision between the wagon and a street car, could not be attributed to plaintiff.—Henry v. Epstein, Ind., 101 N. E. 647.

86. **Pledges**—Right of Pledgee.—A pledgee of collaterals has an election to sue on the original indebtedness without regard to the collaterals, or he may apply the collateral without an attempt to collect from the original debtor.—Ketcham v. Provost, 141 N. Y. Supp. 437.

87.——Sale by Pledgee.—Notice of a pledgee's intention to sell securities pledged, in order to be sufficient, must be reasonable and state when, where and in what manner the sale would be held.—Small v. Housman, N. Y. 101 N. E. 700.

88. **Parent and Child**—Surrender of Custody.—Contract by which the widowed father of an infant surrendered his custody to a home and relinquished all rights over the infant was not contrary to public policy, though it was subject to cancellation on its appearing to be for the best interests of the infant.—Bedford v. Hamilton, Ky., 155 S. W. 1128.

89. **Principal and Agent**—Apparent Authority.—Facts held insufficient to show apparent authority on the part of plaintiff's salesman to indorse or execute commercial paper in its name, so that defendant bank having cashed checks indorsed in plaintiff's name by such salesman without authority, and discounted a draft drawn by him, was liable for his misappropriation of the proceeds.—Pluto Powder Co. v. Cuba City State Bank, Wis., 141 N. W. 220.

90.——Implied Authority.—The power to sell and convey only authorized the agent to sell and convey for a fair money consideration and not to make an exchange of property.—Ross v. Kenwood Inv. Co. Wash., 131 Pac. 649

91. **Principal and Surety**—Waiver.—Where the surety on a building contract had the suit upon its bond delayed at its request, it cannot afterwards complain that the suit was not brought within six months after the work was completed, as required by the contract, having waived that provision.—Eilers Music House v. Hopkins, Wash., 131 Pac. 838.

92. **Process**—Waiver.—A second service of process does not waive the first service nor effect a shortening of the time allowed a defendant to do an act under the law applying to the first service.—Townsend v. Parker, Cal., 131 Pac. 766.

93. **Rape**—Civil Action.—To show that a female over 16 and under 18 years of age consented to the act or acts of sexual intercourse will not constitute a defense to a civil action for damages for rape.—Watson v. Taylor, Okla., 131 Pac. 922.

94. **Release**—Fraud.—A party induced to sign a written release in reliance on false and fraudulent representations, and who is guilty of no negligence in failing to ascertain its character, is not bound thereby.—Bessey v. Minneapolis, St. Paul & S. S. M. Ry. Co., Wis., 141 N. W. 244.

95. **Remainders**—Merger.—Where a remainder was contingent upon the remaindermen surviving a life tenant, and she and the testator's heirs conveyed her estate and the heirs' reversionary interest, the conveyances merged the two estates in the grantee, making him the absolute owner.—Belding v. Parsons, Ill., 101 N. E. 570.

96. **Sales**—Conditional Sale. — A conditional vendor only has a lien as security for the purchase money by the retention of title, and does not own the property absolutely.—Nance v. O. K. Houck Piano Co., Tenn., 155 S. W. 1172.

97.——Option.—Where a purchaser fails to exercise his option to select between two brands of lumber purchased, the seller may in good faith do so, and where he is at all times ready to deliver, he may recover the price.—Storm v. Rosenthal, 141 N. Y. Supp. 339.

98. **Set-Off and Counterclaim**—Substantial Performance.—Where plaintiff seeks to recover under the doctrine of substantial performance of an express contract, defendant may recover the damages suffered by reason of plaintiff's failure of strict performance.—Blakely v. J. Neils Lumber Co., Minn., 141 N. W. 179.

99. **Subrogation**—Right to.—A vendee who as part of the price pays the indebtedness secured by a first mortgage is not subrogated to the lien as against a second mortgagee whose mortgage is recorded at the time of the purchase.—Kahn v. McConnell, Okla., 131 Pac. 682.

100.——Volunteer.—One who advances money, or lends, or pays the debt of a municipal contractor at his request, is not a mere volunteer, and such advances will support an assignment of the contractor's compensation.—American Fidelity Co. of Montpelier, Vt., v. East Ohio Sewer Pipe Co., Ind., 101 N. E. 671.

101. **Tenancy in Common**—Conversion.—One tenant may convert the common property as against his co-tenant by rendering impossible any further enjoyment by the latter co-tenant or refusing to appropriate it to the use for which it is designed.—Bimel v. Boyd, Ind., 101 N. E. 657.

102. **Trover and Conversion**—Manufactured Products.—Where crude gum is wrongfully extracted from growing trees and manufactured into spirits of turpentine and resin, the owner may maintain trover for the manufactured products.—Strictland v. Miller, Ga., 78 S. E. 48.

103. **Trusts**—Resulting Trust.—One who, pursuant to an agreement, purchased land at a foreclosure sale and took the deed in his own name as security for the money advanced for the purchase, held a trustee under resulting trust.—Wilson v. Hoffman, Miss., 61 So. 699.

104.——Words Importing. — No particular words are necessary to create a trust; but trust relations will be implied when it appears that such was the intention of the parties, and when the nature of the transaction is such as to justify or require it.—Symmers v. Carroll, N. Y., 101 N. E. 698.

105. **Wills**—Testamentary Capacity.—One may have testamentary capacity though not capable of transacting ordinary business.—Kellan v. Kellan, Ill., 101 N. E. 614.

106.——Codicil.—Both the will and codicil, when proven, constitute but one will.—Mosser v. Flake, Ill., 101 N. E. 540.

107.——Construction.—Words of a will constituting a general gift must prevail, unless subsequent language at least equally specific imposes a specific character upon the gift.—In re Marshall, 141 N. Y. Supp. 540.

108.——Election.—An election to take under a will may be inferred from the conduct of a party, his acts, omissions, modes of dealing with either property, acceptance of rents and profits, and the like.—Owens v. Andrews, N. M., 131 Pac. 1004.

109.——Execution.—A will otherwise properly executed, published and declared not invalidated by the fact that the signature follows, instead of preceding, the attestation clause.—In re Young's Will, Wis., 141 N. W. 226.